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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
 )  
Annual Assessment of the Status of ) CS Docket No. 97-141  
Competition in Markets for the )  
Delivery of Video Programming )

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COMMENTS OF BELL ATLANTIC<sup>1</sup> AND NYNEX<sup>2</sup>

Although telephone companies are now able to provide video programming directly to subscribers in their own service territories, and many telephone companies are doing so, access to programming remains a critical factor in determining whether new entrants will be able to compete successfully with incumbent cable operators. Obtaining access to key programming can be a difficult and protracted process,<sup>3</sup> even where the vendor of programming is clearly subject to the program access rules.<sup>4</sup>

Moreover, limitations in the existing program access statute provide a means by which programming vendors can evade the rules, and there are indications that some are taking steps to

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<sup>1</sup> The Bell Atlantic companies ("Bell Atlantic") are Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., Bell Atlantic-West Virginia, Inc., and Bell Atlantic Video Services Company.

<sup>2</sup> The NYNEX Telephone Companies ("NYNEX") are New York Telephone Company and New England Telephone and Telegraph Company.

<sup>3</sup> For example, the Commission recently found that Rainbow Programming Holdings, Inc. ("Rainbow") unlawfully refused to sell its SportsChannel New York to Bell Atlantic Video Services Company ("BVS"). BVS first attempted to obtain programming from Rainbow in early October, 1996. BVS filed its complaint against Rainbow on March 28, 1997. *Bell Atlantic Video Services Co. v. Rainbow Programming Holdings, Inc., et al.*, CSR-4983-P, Memorandum Opinion and Order at ¶¶ 2, 8, 29 (rel. July 11, 1997) ("*Rainbow Order*").

<sup>4</sup> 47 U.S.C. §548; 47 C.F.R. §76.1002.

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do so. Finally, the compulsory copyright license, if interpreted incorrectly, could make compliance with the Commission's open video system (OVS) rules a practical impossibility, and effectively foreclose one option Congress intended for telephone company entry into the video marketplace.

To ensure that consumers have the opportunity to benefit from real competition in the market for video delivery, the Commission should amend its program access rules to eliminate any incentive for programming vendors to flout those rules. In addition, the Commission should recommend to Congress that the program access statute be amended to apply regardless of the method by which programming is delivered and, at least for certain key programming, regardless of whether the programming vendor is vertically integrated or not. Finally, the Commission should confirm for the Copyright Office that open video systems meet the unique statutory definition of "cable system" that determines who is entitled to the benefit of the compulsory license, and, if necessary, should recommend to Congress that the compulsory license be amended so that no multichannel video program distributor (MVPD) is precluded from competing by being required to negotiate individually with each copyright owner.

**I. The Commission Should Establish Penalties To Deter Violations Of Its Program Access Rules.**

The Commission acted expeditiously on BVS's complaint against Rainbow, and ordered Rainbow to sell its programming to BVS on non-discriminatory terms.<sup>5</sup> Yet despite the fact that Rainbow unreasonably refused to sell its programming in blatant disregard of the program access rules, it suffered no penalty for violating the law. Rainbow faces no damages liability to BVS,

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<sup>5</sup> *Rainbow Order* at ¶ 31.

no administrative fines, and no forfeiture or other financial penalty.<sup>6</sup> As a result, to the extent that Rainbow finds it in its own interest to deny programming to competitors of incumbent cable operators, it comes out ahead even though it was found to have violated the rules.

To ensure that programming vendors do not find it in their interest to disregard the law, the Commission should establish and apply penalties for violation of the program access rules. Otherwise cable programmers will have little incentive to comply with the law, and Congress' goal of protecting and promoting new video distribution competition through the program access rules will be frustrated.<sup>7</sup>

## **II. The Commission Should Recommend Amendments To The Program Access Statute To Ensure That Consumers Have A Real Choice Among Video Programming Providers.**

### **A. More And More Key Programming Is Controlled By A Few Of The Largest MSOs.**

Since the Commission's last report,<sup>8</sup> a variety of deals among large multiple system operators (MSOs) and programming vendors have occurred or been announced. The effect has been to concentrate control of key programming among a few powerful players in the cable industry.<sup>9</sup> In addition to certain "marquee" networks which are generally acknowledged to be necessary for a successful multichannel offering,<sup>10</sup> access to regional sports programming is vital

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<sup>6</sup> The Bureau declined to impose any sanctions at this time, although it did not foreclose the imposition of appropriate administrative remedies if Rainbow fails to comply with the Bureau's order. *Rainbow Order* at ¶ 30

<sup>7</sup> See *Rainbow Order* at ¶ 16.

<sup>8</sup> *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 96-133, Third Annual Report, FCC 96-496 (rel. Jan. 2, 1997).

<sup>9</sup> The relationships created by the transactions, a few of which are described in the text, have both horizontal and vertical aspects.

<sup>10</sup> See David Waterman, *Vertical Integration and Program Access in the Cable Television Industry*, 47 Fed. Comm. L.J. 511, 518 (1995) ("[T]here seems to be a consensus in the industry

to new entrants attempting to compete with incumbent cable operators.<sup>11</sup> Many of the reported transactions focus particularly on gaining control of regional sports programming.

For example, in March, Cablevision announced that it was expanding the scope of its lock on local sports programming in New York by acquiring from its partner, ITT Corp., the remaining half interest in Madison Square Garden, the MSG Network, and the New York Knicks and New York Rangers teams.<sup>12</sup> As a result, Cablevision, the sixth largest MSO, added control of the Knicks and Rangers to the cable rights to the Yankees, Mets, Devils, Nets, and Islanders that it already owned. Cablevision, through Rainbow, also controls both SportsChannel New York and MSG Network. "In one fell swoop, . . . [Cablevision] locked up control of the nation's most famous sports arena and of cable rights to both baseball teams, both basketball teams, the three hockey teams and both major sports channels in the New York metropolitan area."<sup>13</sup> "Cablevision has become the uncontested powerhouse of television sports."<sup>14</sup>

Shortly thereafter, Tele-Communications, Inc. (TCI) agreed to sell ten cable systems serving 820,000 subscribers in the New York area of dominant influence (ADI) to Cablevision, which already owned systems serving 1.7 million subscribers in the New York market, in exchange for a one-third interest in Cablevision. As a result, Cablevision obtained a "cluster" of

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that the lack of more than one or two of the well-known networks such as ESPN, USA, CNN, and HBO, would seriously handicap a multichannel competitor to an established cable system").

<sup>11</sup> See "Brian Roberts Charts a New Course for Comcast," *Cable World* at 16, 70, October 14, 1996 (Comcast President calls local sports "the most compelling content of all").

<sup>12</sup> "Cablevision's Accord With ITT Yields A Costly Coup," *Wall Street Journal*, March 10, 1997.

<sup>13</sup> "As Wall Street Groans, A Cable Dynasty Grows," *New York Times*, April 27, 1997.

<sup>14</sup> *Id.*

2.5 million subscribers in the New York market, the largest cluster of its kind in the United States,<sup>15</sup> and the country's largest MSO obtained a one-third interest in the sixth largest MSO.

Just a few days later, TCI and News Corp., through their Fox/Liberty Networks venture, announced the purchase of 40 per cent of Cablevision's SportsChannel regional sports networks.<sup>16</sup> The new network, to be called Fox Sports Net, will have 18 regional cable sports channels under its direct control, plus non-owned "affiliates" such as Home Team Sports. In addition, Fox Sports Net will hold regional television rights for 17 NBA teams, 12 professional hockey teams, 20 Major League Baseball teams, and 20 collegiate leagues.<sup>17</sup>

In addition, News Corp. recently became a partner in PrimeStar Partners, a DBS operator which is jointly owned by TCI, Time Warner, Comcast, and Continental/US WEST.<sup>18</sup> Finally, Microsoft, which owns half of MSNBC, is making a \$1 billion investment in Comcast, which serves 4.3 million subscribers and holds ownership interests in Liberty and several programming services.<sup>19</sup> These transactions mean that a few very powerful players control much of the programming that is key to operating a successful multichannel programming service.<sup>20</sup>

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<sup>15</sup> "More Moves for TCI/Cablevision?" *Multichannel News* at 1, June 16, 1997. In addition to their sports programming, Cablevision, through Rainbow, owns cable programming services such as Bravo and American Movie Classics. "As Wall Street Groans," *supra*. TCI owns significant interests in cable programming services such as Encore, Home Shopping Network, fX, Starz!, The Learning Channel, and QVC. *Third Annual Report*, Appendix G, Table 1.

<sup>16</sup> "A Sporting Chance To Be No. 1," *Washington Post* at C1, June 24, 1997.

<sup>17</sup> *Id.* at C1, C12.

<sup>18</sup> *Id.* at C12. Time Warner owns cable programming services such as Cinemax, CNN, CNN Headline News, HBO, TBS, TNT, and Turner Classic Movies. Time Warner also owns significant interests in other programming services such as Comedy Central, E! Entertainment, Court TV, and Black Entertainment Television (BET). *Third Annual Report*, Appendix G, Table 1.

<sup>19</sup> "What Microsoft Wants with Comcast Corp.," *Multichannel News* at 1, June 16, 1997. Comcast's programming services include QVC, The Golf Channel, Viewer's Choice, and Outdoor Life. In addition, Comcast owns a majority interest in the Philadelphia 76ers, the Flyers, and two sports arenas. It is planning to launch a regional sports network in the

**B. Key Programming Should Be Available To Competing Video Programming Distributors Regardless Of Delivery Method Or The Owner's Vertical Integration.**

The present program access statute applies to programming in which a cable operator has an "attributable interest" and which is satellite-delivered.<sup>21</sup> As a result, programming vendors could evade the requirements of the program access rules by moving programming that currently is satellite-delivered to some other delivery method. There is evidence that they are doing so. For example, the New York Times reported that "Cablevision is moving to circumvent a Federal requirement to share sports programming delivered by satellite with rivals in New York City. The law does not apply to programming services delivered by cable land lines, so the company is busily laying fiber-optic cables so it can switch its method of transmission."<sup>22</sup>

The statute's limitation no longer makes any sense, if it ever did. Cablevision's sports programming will not be less important to consumers if it is delivered by terrestrial means instead of satellite. Nor will Cablevision's ability to discriminate against other multichannel programming distributors diminish. Instead, consumers who want to watch their favorite team

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Philadelphia area in conjunction with the Phillies, which will control cable television rights to all three sports teams. "Cablevision's Accord With ITT," *supra*.

<sup>20</sup> See *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, First Report, 9 FCC Rcd 7442, 7531-32 (1994) (discussing cable industry's acknowledgment that "popular, nationally-distributed" cable services "arguably are vital to competitors that use alternative technologies"); "Cablevision Accord With ITT," *supra* ("To lock in a very valuable local sports team is another way cable companies can protect their franchises").

<sup>21</sup> 47 U.S.C. §548. See also 47 C.F.R. §76.1002.

<sup>22</sup> "As Wall Street Groans," *supra*. See also "Cablevision Reaches for Sports Exclusivity," *Multichannel News*, Feb. 10, 1997 ("[Cablevision], in an attempt to protect its cable franchise against competition, is pitching a fiber optic-delivered local New York sports service that could help it skirt the 1992 Cable Act programming-access rules").

on television will have no alternative but the packaging and pricing options Cablevision offers.<sup>23</sup>

To ensure that consumers do not lose the benefits of competition that Congress sought to achieve by mandating access to programming,<sup>24</sup> the Commission should recommend to Congress that the program access statute be amended to eliminate any limitation based on the method or technology by which programming is delivered.

Similarly, if vendors of key programming unreasonably discriminate in favor of incumbent cable operators with respect to the terms and conditions under which such programming is made available, consumers lose the benefits of competition among video programming providers regardless of whether the programming vendor is vertically integrated with a cable operator or not. Therefore, the Commission should recommend to Congress that the program access statute be amended to ensure that unique programming -- for example, live sports programming involving games of a favorite team -- is available on nondiscriminatory terms to competing MVPDs.

### **III. The Commission Should Confirm For The Copyright Office That OVS Meets The Statutory Definition Of A “Cable System.”**

The Cable Compulsory Copyright License, which permits cable systems to retransmit broadcast signals without liability for copyright infringement, defines a cable system as “a facility, located in any State, Territory, Trust Territory or Possession, that in whole or in part

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<sup>23</sup> See “Cablevision’s Accord With ITT,” *supra* (“Cablevision’s potential emphasis on premium channels and packaging worries some consumer advocates, who predict the overall cost to viewers for the same number of games as currently available would increase”); “Cable Sports Viewers Face Changes,” *New York Times*, March 8, 1997 (“Mr. Dolan did not explain how viewers who currently watch games on basic cable would benefit when some of those telecasts are available only if an extra fee must be paid”); “A Sporting Chance,” *supra* at C12 (“ultimately fans could pay more for tickets and cable customers could wind up with higher monthly bills as the inflated cost of televising sports are passed along by cable operators around the country”).

<sup>24</sup> See *Rainbow Order* at ¶ 16.

receives signals transmitted or programs broadcast . . . and makes secondary transmission of such signals or programs by wires, cables, or other communications channels to subscribing members of the public who pay for such service.”<sup>25</sup> An open video system, such as Bell Atlantic’s OVS in Dover Township, New Jersey,<sup>26</sup> clearly meets the Copyright Act’s definition of a “cable system” and therefore is entitled to the benefit of the compulsory copyright license. The Telecommunications Act of 1996 (the Act) -- which subjects OVS operators to the retransmission consent and must carry rules applicable to cable operators -- and the Commission’s rules implementing the Act confirm this interpretation.<sup>27</sup>

Some parties have argued nevertheless that OVS is not a cable system and that OVS operators and programmers cannot use the compulsory copyright license; the Copyright Office is currently considering this issue among several others. If MVPDs or other video programming providers using OVS capacity were required to negotiate individually with each copyright holder of each program on a broadcast station included in the programmer’s line-up, programmers would have no interest in using an OVS to reach subscribers. Similarly, if the OVS operator -- which must ensure that all subscribers receive “must carry” stations -- were required to negotiate individually with each copyright holder of each program on each must carry station, the OVS option would be a practical impossibility. Such a result would transform OVS into an illusory

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<sup>25</sup> 17 U.S.C. §111(f). The definition of a “cable system” contained in the Copyright Act is unique and specific to that statute, and is different from the definition of a “cable system” in Title VI of the Communications Act. *See* 47 U.S.C. §522(7).

<sup>26</sup> Attachment A to these Comments provides an update on Bell Atlantic’s video activities.

<sup>27</sup> 47 U.S.C. §573(c)(1); 47 C.F.R. §76.1506. *See also* 47 U.S.C. §573(c)(4) (“Nothing in this Act precludes a video programming provider making use of an open video system from being treated as an operator of a cable system for purposes of section 111 of title 17, United States Code”).



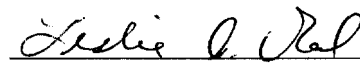
option and would fly in the face of Congress' clear intention to make OVS a viable entry strategy for telephone companies.<sup>28</sup>

### CONCLUSION

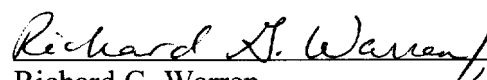
New entrants will have no chance of being viable competitors to incumbent cable operators unless they have access to key programming on nondiscriminatory terms. The Commission should take the steps described above to ensure that competition in the market for video delivery is not stifled and that consumers have the opportunity to reap the benefits Congress intended.

Respectfully submitted,

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<sup>28</sup> Conference Report at 172, 177.

## **UPDATE ON BELL ATLANTIC VIDEO ACTIVITIES**

### **I. Dover Township, New Jersey**

On October 7, 1996, Bell Atlantic-New Jersey, Inc. ("Bell Atlantic") notified the Commission that it had elected to operate the Dover Township system as an open video system (OVS), and requested an extension of time until March 1, 1997 to complete the transition. On the same day, Bell Atlantic filed form 1275 for certification to operate an OVS in Dover Township.

On October 17, 1996, the Commission approved Bell Atlantic's certification. On December 2, 1996, the Commission granted an extension of time until March 1, 1997 to complete the transition of the Dover Township system to OVS.

On October 29, 1996, Bell Atlantic filed its Notice of Intent to establish an OVS in Dover Township, New Jersey. The Notice provided for an open enrollment period beginning November 1, 1996 and ending January 31, 1997.

On November 1, Bell Atlantic Video Services Company ("BVS") acquired substantially all of the assets of FutureVision in Dover Township, New Jersey and began offering video programming on the Dover Township system.

At the conclusion of the open enrollment period on January 31, 1997, Bell Atlantic had provided information packages to three video programming providers. Although none reserved capacity on the Dover Township OVS, one provider of a single channel reached agreement with BVS for incorporation into BVS's line-up.

On March 1, 1997, the Dover Township system began operation as an OVS.

### **II. Northern Virginia Market Trial**

As planned, and pursuant to the authorization for the trial, BVS ended its successful market trial of video-on-demand service in October, 1996. Participating subscribers averaged 3.6 videos purchased per month from January through September, 1996. New movies were the most popular offering, comprising 57 per cent of total purchases. Other popular offerings included children's and special interest programming, and TV series and specials.